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IN THE

Supreme Court of the United States

OCTOBER, 1984

NO.

SARAH BARKER,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

David B. Byrne, Jr.
John M. Bolton, III
Attorneys for Petitioner
P. O. Drawer 1470
Montgomery, Alabama 36102

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SARAH BARKER,

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PETITION FOR WRIT OF CERTIORARI
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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Sarah Barker, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-styled case on July 5, 1984.

QUESTION PRESENTED

I

Whether the trial court's removal of a juror after deliberations had begun and substitution of a previously discharged alternate violated Rule 24(c), Federal Rules of Criminal Procedure, and the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is printed in Appendix A hereto, *infra*. The judgment of the United States Court of Appeals for the Eleventh Circuit is printed in Appendix A hereto, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit (Appendix A, *infra*) was entered on July 5, 1984. The jurisdiction of the Supreme Court is invoked under Rule 17(1)(a), Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I.

Constitution of the United States, Amendment V

"no person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

II.

Constitution of the United States, Amendment VI

"in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

III.

Rule 24(c), Federal Rules of Criminal Procedure

"An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

STATEMENT OF THE CASE

Sarah Barker was charged in a one-count indictment alleging a violation of Title 18, United States Code, Section 656, on December 13, 1982. More specifically, Miss Barker was charged with misapplying and converting to her own use nine (9) one-hundred-dollar ($100.00) Citicorp Travelers Checks. The defendant was tried before the Honorable Robert E. Varner and a jury commencing on March 7, 1983, for one day, with the trial continuing on March 14, 1983. On March 15, 1983, the defendant was convicted of violating Title 18, United States Code, Section 656. On April 15, 1983, Miss Barker was sentenced to three (3) years' probation subject to restitution in the amount of Nine Hundred ($900.00) Dollars.

Following the completion of its oral charge to the jury, the trial court released the alternate juror, Mrs. Cravey. The jury then left the court room and commenced deliberations.

Approximately twenty minutes later the court called counsel into chambers and advised them about an incident which had taken place prior to the jury's commencing deliberations. A Deputy United States Marshall reported that one of the jurors, later identified as Mrs. Vaughn, was observed to step from the elevator and walk over to where the defendant was standing with her parents and friends. Mrs. Vaughn placed her hand on the defendant's shoulder, smiled and departed. No conversation occurred.

Counsel for the government moved that the juror Vaughn be excused from deliberating on the verdict on the ground that her conduct showed that she was not an impartial juror. The defendant's counsel objected to the removal of the juror on the ground that deliberations had already begun and that Mrs. Vaughn's removal would deprive the defendant of a juror who was apparently sympathetic to her case.

The court recalled the alternate juror, Mrs. Cravey, and sent her to the judge's office. Next, the jury was directed to re-enter the jury box and identify themselves. The court then directed Mrs. Vaughn

to the jury room by herself. Then, the trial court made the following statement to the remaining jurors assembled:

> **THE COURT:** Ladies and gentlemen of the jury, we have to be super cautious as in both the qualifications of jurors and in any sensitive question which may indicate that a juror should have been disqualified. There is a possibility that Mrs. Vaughn should have been disqualified initially. We can't be sure about that, and possibly she even can't tell us. We don't want to do anything to hurt a juror's feelings or to make it appear that a juror is doing anything improper unless we are absolutely sure. But our first duty is to the parties in the case. And if anything happens which may indicate that a juror is prejudiced in the case or is in any way involved to the extent that might indicate that that juror should not hear the case, should not participate in the deliberations, then it is my duty to excuse that juror from deliberations and to let another juror serve.

Following these remarks, Mrs. Vaughn was replaced by the alternate juror, Mrs. Cravey, and the reconstituted jury was instructed to put aside the deliberations that had already occurred and recommence deliberations with the new juror.

The Court of Appeals for the Eleventh Circuit, when presented with the above issue, conceded that it was a "close question." The Eleventh Circuit candidly recognized the split of authority when it noted that "there are cases in other circuits which have refused to permit substitutions once the jury has retired . . ." Despite this, the case was affirmed on July 5, 1984.

REASONS FOR GRANTING WRIT

The decision of the Court of Appeals for the Eleventh Circuit regarding the substitution of an alternate juror once deliberations had begun is not consistent with the decisions of the United States Court of Appeals for the Eighth and Ninth Circuits. Moreover,

although the precise issue was not addressed, decisions of the Second and Tenth Circuits would also appear to be in conflict with the Eleventh Circuit opinion.

The defendant challenges the juror removal procedure utilized by the trial court on three grounds. First, the court clearly violated the requirements of Rule 24(c), Federal Rules of Criminal Procedure, by replacing a sitting juror after deliberations had begun with an alternate juror who had been previously discharged. Secondly, the dismissal of the sitting juror occurred without a hearing or determination of the existence of any prejudice. Finally, the remarks of the trial court to the jury prior to the recommencement of deliberations with the alternate juror were prejudicial to the defendant and violated her Fifth and Sixth Amendment rights.

Rule 24(c), *supra*, provides in pertinent part that:

> An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

Citing the Fifth Circuit's decision in *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981) and its own decision in *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), the United States Court of Appeals for the Eleventh Circuit held that the requirements of Rule 24(c), *supra*, may be "overcome" where the trial courts "procedural precautions obviate the danger of prejudice to a defendant." The Eleventh Circuit further relied upon the "considerable discretion" afforded a trial court in the dismissal of jurors for reasons of prejudice, misconduct, or other impairment of a jurors ability to perform his duties. *United States v. Apodaca*, 666 F.2d 89 (5th Cir. 1982); *United States v. Giarratano*, 622 F.2d 153 (5th Cir. 1980); *United States v. Dominguez*, 615 F.2d 1093 (3rd Cir. 1980).[1]

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[1]The Petitioner notes that neither *Apodaca*, *Giarrantano* or *Dominguez* support the conduct of the trial court in this instance. Each involve circumstances arising *prior* to the jury's commencement of deliberations. *Apodaca* dealt with the challenge of a juror for cause during *voir dire*. The court in *Dominguez* removed a seated, but unsworn juror prior to trial. In *Giarratano*, the juror was removed during the trial, but prior to any deliberations. No violation of Rule 24(c) occurred in any of these cases.

The United States Courts of Appeal for the Second, Eighth, Ninth and Tenth Circuits have all held that the discharge requirement of Rule 24(c) is mandatory. *See United States v. Hayutin*, 398 F.2d 944 (2nd Cir. 1968); *Martin v. United States*, 691 F.2d 1235 (8th Cir. 1983); *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975); *United States v. Beasley*, 464 F.2d 468 (10th Cir. 1972). Based on Rule 24(c), the Ninth Circuit in *Lamb* held that the substitution of a sitting juror with an alternate once deliberations had begun was reversible error because "any benefit to be derived from deviating from the Rule is unclear and the possibility of prejudice is great." *Lamb*, *supra* at 1155. The *Lamb* court cited with approval the concurrence of "one of the Nation's most prestigious legal commentators":

> . . . it is reversible error even though defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate or to substitute an alternate after deliberations have begun." C. Wright, *Federal Practice and Procedure* § 388, Vol. 2 at p. 52 (1969).

Relying upon Rule 24(c), *supra*, the Eighth Circuit in *Martin* permitted the substitution of a sitting juror with an alternate only because deliberations had not commenced.

> . . . although the jury had left the courtroom, because the deliberations had not commenced the jury had not retired to consider the verdict, and the substitution of the alternate juror was proper. *Martin*, *supra* at 1237-38.

Although not presented with the juror substitution issue, the United States Courts of Appeal for the Second and Tenth Circuits made clear their obligation under Rule 24(c). *Hayutin*, *supra* at 950 ("In the face of the mandatory requirement of Rule 24(c) and the Committee's failure at the time of its adoption to include a proposal to permit an alternate juror to replace a regular juror during the deliberations,[2] it is difficult to understand what purpose is to be

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[2]The reference here is to the fact that the original draftsmen of the Federal Rules of Criminal Procedure considered and subsequently rejected Rule 24 language that would have permitted

served by retaining the alternate jurors once the case has been submitted.''); *Beasley*, *supra* at 469 (''It is apparent that this alternate up until the critical time, was just as qualified to sit in deliberation as was any other juror, but this qualification ceased whether or not she was discharged under Rule 24 of the Federal Rules of Criminal Procedure.'')

The *caveat* raised by the Ninth Circuit—probability of prejudice—was highlighted by the circumstances of this case. The trial court's after-the-fact examination of the sitting juror, Mrs. Vaughn, disclosed no grounds for disqualification. The court's remarks to the reconstituted jury left the clear impression that the court felt that Mrs. Vaughn was prejudiced or was in some way ''involved'' to the extent that she should not hear the case and participate in deliberations. Assuming, *arguendo*, that juror Vaughn had been a voice for acquittal, the specter of misconduct alluded to by the court unavoidably tainted the *venire* and impacted upon the Fifth and Sixth Amendment rights of the petitioner.

CONCLUSION

Sarah Barker submits that the Writ of Certiorari should be granted and upon final determination of this cause the conviction of the petitioner in the United States District Court for the Middle District of Alabama should be reversed in that:

(a) A split of authority exists between the Eleventh and the Eighth and Ninth Circuits' disposition of cases involving the removal of a sitting juror after deliberations have begun and the substitution of a previously discharged alternate;

(b) That this conflict is due to be resolved by the Supreme Court in a manner establishing a standard procedure for disposing of similar circumstances and to provide guidance to other courts in the interpretation of Rule 24, F.R.Cr.P;

the substitution of a juror after the commencement of deliberations. Apparently this Court queried the rules committee whether such a procedure would be desirable or even constitutional. *See* Orfield, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43,46,53 (1961)

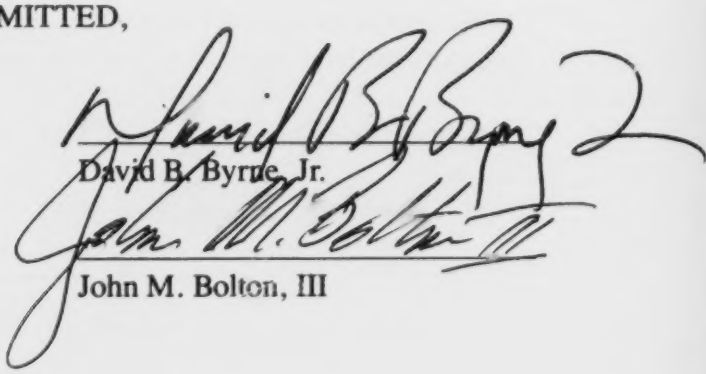
(c) That under the circumstances presented herein the substitution of a sitting juror with an alternate once deliberations have begun is inherently prejudicial to the defendant and denies her due process and the right to an impartial jury in violation of her Fifth and Sixth Amendment rights;

(d) That the trial court's removal of a sitting juror without first conducting a hearing to evaluate the possibility of misconduct and prejudice denied the defendant the right to a fair trial and an impartial jury;

(e) That the trial court's remarks to the reconstituted jury had a chilling effect upon the jury and may have adversely influenced the voluntary exercise of their independent judgment.

For the reasons set forth hereinabove, petitioner respectfully requests this court to grant her Petition for Writ of Certiorari in order that the issues may be fully briefed and decision in favor of petitioner ultimately reached.

RESPECTFULLY SUBMITTED,



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John M. Bolton, III

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Montgomery, Alabama 36102

DATED: September 4, 1984

CERTIFICATE OF SERVICE

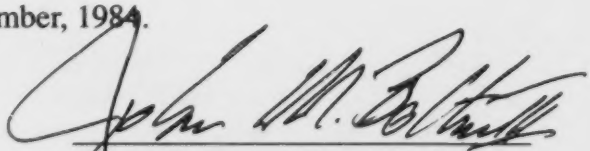
I, John M. Bolton, III, a member of the bar of the Supreme Court of the United States and counsel of record for Sarah Barker, Petitioner herein, hereby certify that on September 4, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed to the post office address of the Solicitor General, Washington, D.C. 20530.

On the Honorable John Bell, United States Attorney for the Middle District of Alabama, Federal Building, Montgomery, Alabama 36104, by depositing such copies in the United States Post Office, Montgomery, Alabama, first class postage prepaid, properly addressed, to the post office address of the United States Attorney, the above-named counsel of record, at the Federal Building, Montgomery, Alabama 36104.

All parties required to be served have been served.

DATED 4th day of September, 1984.



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APPENDIX A

OPINION

UNITED STATES v. BARKER

UNITED STATES of America,
Plaintiff-Appellee,

v.

Sarah BARKER,
Defendant-Appellant.

No. 83-7252.

United States Court of Appeals,
Eleventh Circuit.

July 5, 1984.

Defendant, a bank employee, was convicted in the United States District Court for the Middle District of Alabama, Robert E. Varner, Chief Judge, of misapplying and converting travelers checks, and she appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) circumstantial evidence and handwriting analysis were sufficient to sustain conviction; (2) trial court properly gave aiding and abetting instruction; (3) trial court did not err in excusing juror who, on way to begin deliberations, placed her hand on defendant's shoulder and smiled; and (4) defendant's co-workers were properly permitted to testify as to similarity between defendant's handwriting and that on converted checks.

Affirmed.

1. Banks and Banking ⇐509.25

In prosecution of bank employee for misapplying and converting travelers checks, circumstantial evidence as to defendant's access to checks and testimony that signatures on checks were written by defendant were sufficient to sustain conviction. 18 U.S.C.A. § 656.

2. Criminal Law ⇐1043(3)

Defendant cannot raise on appeal objection to instruction which he failed to raise below. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

3. Criminal Law ⇐59(5)

Aiding and abetting offense occurs when person willfully associates himself in some way with criminal venture and willfully participates in it as he would in something he wished to bring about.

4. Criminal Law ⇐792(2)

In light of evidence in prosecution for misapplying and converting travelers checks that, at least in some instances, checks were negotiated by confederate of defendant, trial court properly instructed jury on law of aiding and abetting. 18 U.S.C.A. § 656.

5. Jury ⇐149

Trial court did not err in excusing juror who, on way to begin deliberations, placed her hand on defendant's shoulder and smiled, and in replacing her with alternate juror 20 minutes after deliberations had begun, where trial court ascertained that jury could proceed on impartial basis, carefully explained excusal to jurors in nonprejudicial manner, and was careful not to implicate defendant in any misconduct. Fed.Rules Cr.Proc.Rule 24(c), 18 U.S.C.A.

6. Criminal Law ⇐452(4)

In prosecution of bank employee for misapplying and converting travelers checks, defendant's co-workers were properly permitted to testify that defendant's handwriting matched or was similar to handwriting on converted checks. 18 U.S.C.A. § 656; Fed.Rules Evid.Rules 701, 901(b)(2, 3), 28 U.S.C.A.

7. Criminal Law ⇐627.6(5)

In prosecution of bank employee for misapplying and converting travelers checks, Government provided adequate notice to defendant of results of handwriting comparison in form of FBI form which stated that certain bank employees had identified signatures on travelers checks as handwriting of defendant, notwithstanding that

specific names of identifying employees were not furnished. 18 U.S.C.A. § 656; Fed.Rules Cr.Proc.Rule 16, 18 U.S.C.A.

Appeal from the United States District Court for the Middle District of Alabama.

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge:

Defendant Sarah Barker, a bank employee, was convicted under 18 U.S.C.A. § 656 of misapplying and converting to her own use nine $100 Citicorp Traveler's Checks, and was sentenced to three years' probation subject to restitution in the amount of $900.00. Barker appeals her conviction on grounds that (1) the evidence was insufficient to support a conviction; (2) the instruction to the jury on aiding and abetting was erroneous; (3) the court's substitution of an alternate juror after deliberations had begun was error; and (4) the court erroneously admitted lay witness testimony on the question of handwriting identification. We affirm.

The traveler's checks at issue were discovered missing from the South Trust Bank, formerly Southern Bank, in Montgomery, Alabama, during a routine internal audit performed at the end of June 1982. The checks were negotiated in stores and restaurants in Clanton, Alabaster, Hoover and Vestavia, Alabama, under the name "Sharon Barnes" between July 2 and July 5, 1982. Barker's chief contentions were that she did not take the checks, nor was she physically present at the locations where the checks were presented.

[1] Although there was no direct evidence that Barker took the traveler's checks, viewed in the light most favorable to the Government, the circumstantial evidence was adequate to permit a reasonable trier of fact to find guilt beyond a reasonable doubt. *See United States v. Bell*, 678 F.2d 547 (5th Cir. Unit B 1982). Defendant Barker, as a loan officer of the bank, had access to the areas where the traveler's checks were kept. Two of her co-workers testified that

the handwriting on the traveler's checks was similar to or recognizable as Barker's. An F.B.I. Documents Examiner who compared the handwriting on the checks with the known handwriting of the defendant testified that the signatures in question were written by Barker. While this testimony was disputed by an expert witness called by the defense, the jury could reasonably have concluded that the handwriting on the traveler's checks was that of the defendant. Each juror was permitted to examine the handwriting exhibits and to draw conclusions regarding similarities and differences.

[2] Barker contends the aiding and abetting instruction given to the jury represented an improper statement of the law and was not supported by the facts. At trial, however, defendant expressly objected "[n]ot to the content of the charge, but the fact that one was given." The defendant cannot raise on appeal an objection to an instruction which she failed to raise below. Fed.R.Crim.P. 30.

[3,4] An aiding and abetting offense occurs when a person "willfully associates himself in some way with the criminal venture and willfully participated in it as he would in something he wished to bring about." *United States v. Phillips*, 664 F.2d 971, 1010 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Several of the witnesses who observed the checks being negotiated testified that two persons were present. The testimony indicated that at least in some instances the checks were not actually negotiated by the defendant. The court properly instructed the jury that one who "aids, abets, induces or procures" the commission of the offense against the United States is punishable as a principal.

[5] Defendant's third claim presents a close question. Approximately twenty minutes after the jury began its deliberations, the court called the jury back into the courtroom and replaced juror Vaughn with an alternate juror. Juror Vaughn was replaced because of an incident observed and recounted to the court by a Deputy United States Marshal. When juror Vaughn stepped from the elevator on the way to begin deliberations, she went over to where the defendant was standing, placed her hand on the defendant's shoulder,

smiled, and moved on. No conversation occurred. Vaughn subsequently explained her action as a sympathetic gesture unrelated to her belief as to the defendant's innocence or guilt.

Over the objections of defense counsel, the court granted the Government's motion to excuse Vaughn from deliberating on the ground that her conduct indicated she was not impartial and may have made her decision before deliberations began. After sending Vaughn out of the courtroom, the trial judge informed the remaining jurors that

> we have to be super cautious as in both the qualifications of jurors and in any sensitive question which may indicate that a juror should have been disqualified. There is a possibility that Mrs. Vaughn should have been disqualified initially. We can't be sure about that, and possibly she even can't tell us. We don't want to do anything to hurt a juror's feelings or to make it appear that a juror is doing anything improper unless we are absolutely sure. But our first duty is to the parties in the case. And if anything happens which may indicate that a juror is prejudiced in the case or is in any way involved to the extent that might indicate that that juror should not hear the case, should not participate in the deliberations, then it is my duty to excuse that juror from deliberations and to let another juror serve.

In response to the court's inquiry, all of the jurors indicated that they would be able to redeliberate impartially. The court then instructed the jury to begin deliberations anew. After approximately two hours and five minutes, the reconstituted jury returned a verdict of guilty.

Barker contests the procedure employed by the court, and requests a new trial on grounds that (1) the court abused its discretion by failing to hold an evidentiary hearing prior to the removal of juror Vaughn; (2) the court excused Vaughn on a basis which subsequently was shown to be unsupported in fact; (3) the court erred in failing to hold a full hearing regarding communications between the Deputy Clerk, the Deputy United States Marshal, or juror Vaughn and the other members of the jury; (4) the court's instructions to the remaining jurors about juror Vaughn's excusal raised questions

about misconduct which could only have been harmful to the defendant; (5) the Government failed to prove that the juror contact with the defendant and the court's subsequent instructions did not affect the jury; and (6) the court failed to make a specific finding of no prejudice.

This Court dealt extensively with similar situations in *United States v. Phillips*, 664 F.2d 971, 990-997 (5th Cir. Unit B 1981), and in *United States v. Kopituk*, 690 F.2d 1289, 1308 (11th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 3542, 77 L.Ed.2d 1391. We held that the issue is whether a defendant is prejudiced by the substitution of an alternate juror after jury deliberations have begun. These decisions turn on whether the procedural precautions taken by a trial court obviate the danger of prejudice to a defendant and overcome the concerns of the draftsmen of Fed.R.Crim.P. 24(c). That rule provides for the replacement with alternate jurors "prior to the time the jury retires to consider its verdict." *Id.* 993.

The trial court here meticulously met the demands of *Phillips*. In light of the considerable discretion afforded a trial judge in the dismissal of jurors on grounds of prejudice, misconduct, or other impairment of a juror's ability to perform his duties, *see United States v. Apodaca*, 666 F.2d 89 (5th Cir.), *cert. denied*, 459 U.S. 823, 103 S.Ct. 53, 74 L.Ed.2d 58 (1982); *United States v. Giarratano*, 622 F.2d 153 (5th Cir. 1980); *United States v. Dominguez*, 615 F.2d 1093 (3d Cir. 1980), and in light of the fact that it is undisputed that the incident in question did, in fact, occur, the court did not err in deciding that Juror Vaughn should be excused. The judge ascertained that the jury could proceed on an impartial basis and begin its deliberations over again after the addition of the alternate juror. The court carefully explained the excusal to the jurors in a non-prejudicial manner. The judge was not accusatory and did not implicate the defendant in any misconduct. The jurors were instructed to begin anew. No juror indicated any reservations about his ability to do so. The substituted alternate juror participated fully in the more than two hours of deliberations which followed. All of these precautions obviated the danger of undue prejudice. The substitution procedure utilized by the court did not deprive the

defendant of her right to full consideration of her case by an impartial jury panel. Although no specific finding was made regarding prejudice, it is quite obvious the trial court determined that defendant would not be prejudiced by the substitution. Although there is nothing in the record to indicate where the alternate juror was between the time she was excused and the time she was recalled to serve on the jury, there is no suggestion that she did anything or talked to anyone that in any way impaired her ability to serve as an impartial juror.

We note there are cases in other circuits which have refused to permit substitutions once the jury has retired. *See, e.g., United States v. Lamb*, 529 F.2d 1153, 1156 n. 3 (9th Cir. 1975) (en banc) ("When, as here, an alternate juror is permitted to participate in the jury's deliberations after the original jury has retired for deliberations, the violation of the plain prohibition of [Rule 24(c)] is so potently impermissible that the 'possibility of prejudice' . . . is manifest".). *See also* 2 C. Wright, *Federal Practice and Procedure* § 388, at 52 (1969) (" . . . it is reversible error, even though defendant may have consented, to permit an alternate to stay with the jury after they have retired to deliberate or to substitute an alternate after deliberations have begun."). The careful consideration of the issue in *Phillips* would appear to have brought a better decision on the issue, however, and, in any event, this Court is bound by *Phillips*. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

Barker's final claim concerns the court's admission of the testimony of Della Holly and Eunice Sherril, two lay witnesses and co-workers of the defendant, regarding their opinions as to the handwriting on the traveler's checks. Both witnesses testified they were familiar with the defendant's handwriting and stated that in their opinions it matched or was similar to the handwriting on the checks. Defendant contends that the court erred in admitting this testimony over objection because (1) witness Holly's conclusion that the handwriting on the checks was "similar to Sarah's" was too equivocal to be admissible under Fed.R.Evid. 901(b)(3), and (2) the Government failed to give notice of the result of the handwriting

comparisons made by these witnesses when requested to do so pursuant to defendant's Fed.R.Crim.P. 16 discovery motion.

[6,7] The district court did not err in admitting this testimony under Fed.R.Evid. 701, which provides,

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue,

and Fed.R.Evid. 901(b)(2), which allows for the admission of "non-expert opinion as to the genuiness of handwriting, based upon familiarity not acquired for purposes of the litigation." As for the Rule 16 claim, the district court properly ruled that the Government provided adequate notice of the results of the handwriting comparison in the form of an FBI Form 302 which stated that certain bank employees had identified the signatures on the traveler's checks as the handwriting of the defendant. The fact that no names were furnished does not require a finding of non-compliance with the Rule 16 notice requirements.

AFFIRMED.

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

NO. 83-7252

D.C. Docket No. 82-00104

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SARAH BARKER,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Alabama

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and

adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

July 5, 1984

ISSUED AS MANDATE:

Entered: _____

For the court: Spencer D. Mercer, Clerk

By: _____

Deputy Clerk

Office-Supreme Court, U.S.
FILED
OCT 4 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-345

In the Supreme Court of the United States

OCTOBER TERM, 1984

SARAH BARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-345

SARAH BARKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred by replacing a juror with an alternate shortly after the jury's deliberations had commenced.

1. Petitioner was convicted by the United States District Court for the Middle District of Alabama on one count of misapplying and converting to her own use nine traveler's checks, in violation of 18 U.S.C. 656. She was sentenced to three years' probation, conditioned upon her making restitution in the amount of $900. The court of appeals affirmed (Pet. App. 10-17; 735 F.2d 1280).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was employed as a loan officer by the Southern Bank in Montgomery, Alabama. As such, she had access to areas where the bank's traveler's checks were stored. In late June 1982, a routine audit discovered that nine of the checks were missing. Between July 2

and July 5, the checks were negotiated under the name "Sharon Barnes" in stores and restaurants in four towns north of Montgomery. Two of petitioner's co-workers testified that the signatures on the checks resembled petitioner's, and a documents examiner from the Federal Bureau of Investigation concluded that the checks were in fact signed by petitioner. Pet. App. 12-13.

Approximately 20 minutes after the jury began its deliberations, a deputy marshal advised the court that on the way to the jury room, a female juror had walked over to petitioner, placed her hand on petitioner's shoulder, and smiled. The court immediately ordered the jury to cease its deliberations and return to the courtroom. The government moved to dismiss the juror on the ground that she was not impartial. Petitioner objected, and also refused to continue with 11 jurors. The court granted the motion, and substituted an alternate juror who was still in the courthouse. The court then instructed the jury at length concerning the need to avoid any appearance of partiality. In response to the court's inquiry, the jurors indicated that they would be able to disregard their previous deliberations and deliberate impartially with the new juror. The court instructed the jury to begin its consideration of the case anew. Two hours and five minutes later, the jury returned its verdict of guilty. Pet. App. 13-14.

The court of appeals concluded that the district court had "meticulously met the demands" of *United States* v. *Phillips*, 664 F.2d 971, 990-997 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), by obviating any danger of prejudice to petitioner (Pet. App. 15). The court of appeals noted that the district court explained the dismissal to the jury "in a non-prejudicial manner * * * [that] did not implicate the [petitioner] in any misconduct," that none of the jurors indicated any reservations about his or her ability to begin

anew, and that the alternate juror "participated fully in the more than two hours of deliberations which followed" (*ibid.*).

2. Petitioner contends (Pet. 3-6) that the district court committed reversible error by its substitution of an alternate juror in technical violation of Rule 24(c) of the Federal Rules of Criminal Procedure, which provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." [1] This contention was properly rejected by the court of appeals in a decision that does not conflict with any decision of this Court or any other court of appeals. Moreover, the Rules have been amended since the trial of this case to permit a jury of 11 persons to return a verdict, even absent a stipulation of the parties, where the court finds it necessary to excuse a juror after deliberations have begun. Accordingly, the substitution of an alternate juror in this situation is unlikely to recur.

a. In *United States* v. *Phillips, supra*, the court of appeals concluded, after a thorough examination of the history and purpose of Rule 24(c), that a violation of the Rule does not require reversal in the absence of prejudice to the defendant (664 F.2d at 992-995). Application of this principle to the instant case was eminently reasonable. The greatest risk of prejudice that may arise when an alternate juror is substituted after deliberations have begun is that he may be subject to coercion by those who have already

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[1]Petitioner also asserts (Pet. 4, 7), without citation of authority, that the procedure employed by the district court violated her Fifth and Sixth Amendment rights. This claim is without merit. See *United States* v. *Phillips*, 664 F.2d at 992-993; *Henderson* v. *Lane*, 613 F.2d 175, 176-179 (7th Cir.), cert. denied, 446 U.S. 986 (1980); *People* v. *Skelton*, 109 Cal. App. 3d 691, 167 Cal. Rptr. 636 (1980), cert. denied, 450 U.S. 917 (1981). The court of appeals noted (Pet. App. 16) that "[a]lthough no specific finding was made regarding prejudice, it is quite obvious the trial court determined that [petitioner] would not be prejudiced by the substitution."

formed a firm opinion of the case.[2] The short length of time during which the jury deliberated before the alternate was substituted as compared with the much longer period of deliberations with the alternate, however, combined with the court's careful instructions and inquiry of the jurors, ensured that petitioner suffered no prejudice. Given petitioner's objection to proceeding with only 11 jurors, the court's substitution of the alternate, who was still in the courthouse, was quite obviously the most practical course to take. It would be anomalous to conclude that the Rules, which "are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances" (*Fallen* v. *United States*, 378 U.S. 139, 142 (1964)), require reversal on these facts. See also Fed. R. Crim. P. 2, 52.

The cases cited by petitioner as being in conflict are distinguishable from or actually support the decision below. In *Martin* v. *United States*, 691 F.2d 1235, 1238 (8th Cir. 1982), cert. denied, 459 U.S. 1211 (1983), the court cited *Phillips* favorably and found no prejudice to the defendant from the substitution of an alternate under the facts before it. Similarly, in *United States* v. *Hayutin*, 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1968), where three alternates were not discharged as required by Rule 24(c), the court affirmed because it could not "find that [the] defendant * * * was prejudiced by the presence of the alternates" (398 F.2d at 950). In *United States* v. *Beasley*, 464 F.2d 468 (10th Cir. 1972), the court reversed where the alternate had remained in the jury room after the jury retired to deliberate. The court reasoned that the alternate was present as a

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[2]Another risk — that the alternate juror may have discussed the case with others after being excused — was not present here (Pet. App. 16). Only 20 minutes had elapsed, and the alternate had not left the courthouse before being recalled.

"stranger[ ]" who "destroy[ed] the sanctity of the jury" (*id.* at 470). Here, by contrast, the privacy and secrecy of the jury were not violated by the presence of such a stranger. Finally, in *United States* v. *Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc), the jury had reached a guilty verdict after deliberating for four hours over the course of two days. The district judge rejected the verdict, and replaced a juror who asked to be excused with an alternate who had gone home and who knew that the jury had already reached a verdict. Twenty-nine minutes after it began further deliberations, the jury again found the defendant guilty. It was quite clear under those circumstances that the defendant was prejudiced because the newly constituted jury had not considered the case fully and without reliance on the previous deliberations.[3] The instant case presents a much different situation, where the jury had deliberated only briefly before the substitution and had not yet reached a verdict, and where it deliberated much longer after the alternate was substituted. This Court has refused to resolve the asserted conflict with *Lamb* on prior occasions, and there is no reason for a different action here.

b. In any event, Rule 23(b) of the Federal Rules of Criminal Procedure has been amended, effective August 1, 1983, to provide that "[e]ven absent [a] stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." This change eliminates the need to substitute an alternate juror where, as here, a juror has been excused after deliberations have begun. Accordingly, the circumstances presented are unlikely to recur with any frequency.

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[3]Given these facts, the court's suggestion (529 F.2d at 1156 n.7) that any violation of Rule 24(c) requires reversal must be regarded as dictum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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